U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General *Washington, D.C. 20530*

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The Honorable Patrick J. Leahy
United States Senate
Washington, DC 20510

The Honorable Mike Lee
United States Senate
Washington, DC 20510

Dear Senator Leahy and Senator Lee:

This responds to your letters dated December 19, 2018, and July 30, 2019, regarding the reauthorization of the provisions of the Foreign Intelligence Surveillance Act of 1978 (FISA) that are currently set to expire in December. This response has been coordinated with the Office of the Director of National Intelligence, the National Security Agency (NSA) and the Federal Bureau of Investigation (FBI). We apologize for the delay in responding to your letters.

Your letters ask several questions regarding the Intelligence Community's implementation and use of authorities contained in Title V of FISA (50 U.S.C § 1861), as amended by the USA FREEDOM Act of 2015. Consistent with your request, we have sought to provide an unclassified response to your letters. As discussed with your staff, to the extent you have other outstanding questions that are not addressed by this letter, we would be happy to arrange a classified briefing in order to supplement the information communicated in this letter.

One of the important, long-standing national security authorities reauthorized by the USA FREEDOM Act is the authority for the government to acquire tangible things via the so-called "traditional" use of Title V of FISA. "Traditional" use of Title V allows for the acquisition of a wide variety of tangible things that are relevant to authorized national security investigations, provided that those tangible things could otherwise be obtained using a grand jury subpoena or court order. In addition, the Act separately established a mechanism for the government to obtain pursuant to Title V of FISA certain telephone metadata records from U.S. telecommunications providers to help identify contacts of suspected terrorists. That mechanism applies to certain business records referred to as "call detail records," but not to the content of telephone calls.

As you know, in 2018, the NSA identified certain technical irregularities in data it received from telecommunications service providers under the so-called call detail record, or "CDR," provision of Title V. Because it was not feasible for NSA to resolve the issue technologically, in May of 2018, NSA began the process of deleting all CDR data that it had received since 2015. Then, after balancing the program's intelligence value, associated costs, and compliance and data integrity concerns caused by the unique complexities of using these company-generated business records for intelligence purposes, NSA suspended the CDR program. The government is in the process of reviewing whether additional information concerning these compliance and data integrity concerns can be made publicly available, to include the Rule 13(b) notices filed with the Foreign Intelligence Surveillance Court (FISC).

Your letters requested a good faith estimate of the number of unique identifiers collected pursuant to the CDR provision of Title V. In May 2018, before suspending the CDR program, NSA implemented a new process that allowed the Agency to count unique identifiers as opposed to counting all records stored in NSA's repositories. This new process counts each type of identifier separately, and includes counts for phone numbers, International Mobile Subscriber Identities (IMSIs), and International Mobile Equipment Identities (IMEIs). An IMSI is a 15-digit number associated with the Subscriber Identity Module (SIM) card in a mobile phone. An IMEI identifies the specific physical device, much like a serial number. In the records NSA receives under the CDR provision of Title V, IMSIs and IMEIs are associated with a phone number, so the phone number count represents the number of unique phones associated with the records obtained pursuant to the CDR provision of Title V. Utilizing this new process, from May 23, 2018, to December 31, 2018, the number of unique identifiers used to communicate information collected pursuant to orders under the CDR provision of Title V was 19,372,544 phone numbers, which were associated with 7,285,362 International Mobile Subscriber Identities and 5,305,578 International Mobile Equipment Identities.

Your letters also ask about the potential application of the Supreme Court's decision in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), to Title V of FISA. In *Carpenter*, the Supreme Court held that in the context of a criminal investigation, the government's acquisition of seven days of historical cell-site location information (CSLI) from a cell phone company constituted a Fourth Amendment "search" subject to the warrant requirement. However, the *Carpenter* opinion explicitly "does not consider other collection techniques involving foreign affairs or national security." *Id.* at 2220. Moreover, the Court stated that "we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be." *Id.* at 2217 n.3. Finally, the Court noted that "[w]e do not express a view on matters not before us: real-time CSLI or 'tower dumps' (a download of information on all devices that connected to a particular cell site during a particular interval)." *Id.* at 2220. The Department of Justice (Department) and the Intelligence Community carefully consider all Supreme Court precedent, including *Carpenter*, when evaluating how and whether the Fourth Amendment applies to a proposed intelligence activity. While neither the Department nor the Intelligence Community has reached a legal conclusion as to whether the "traditional" Title V provision may

be used to obtain CSLI in light of *Carpenter*, given the significant constitutional and statutory issues the decision raises for the use of that authority to obtain such data, the government has not sought CSLI records or global positioning system (GPS) records pursuant to Title V of FISA since *Carpenter* was decided. The current practice of the government under FISA is to obtain historical and/or prospective CSLI or GPS-based location information for intelligence purposes pursuant to Titles I and/or III of FISA, based upon a showing of probable cause. Finally, with respect to an application under Title V for the production on an ongoing basis of call detail records relating to an authorized counterterrorism investigation, the statute expressly provides that the term "call detail record" does not include "cell site location or global positioning system information." 18 U.S.C. § 1861(k)(3). Thus the government may not obtain CSLI or GPS-based location information in the case of such applications under Title V of FISA.

Your letters asked about the range of "tangible things"—beyond CDRs—that the government has sought under Title V. As you know, Title V authorizes the government to apply to the FISC for an order directing the production of business records or other tangible things that are relevant to an authorized national security investigation, provided that with respect to a United States person, such investigation is not conducted solely on the basis of First Amendment protected activities. As noted above, an order issued by the FISC under Title V may only require the production of a tangible thing if such thing could otherwise be obtained via a grand jury subpoena or with any other order issued by a court of the United States. *See* 50 U.S.C. § 1861(c)(2)(D). Examples of the types of tangible things sought pursuant to Title V of FISA since 2002 include electronic communication transactional records, shipping records, hotel records, sales records, banking records, and car rental records. Other tangible things, beyond CDRs, that the government has sought under Title V of FISA may include classified or other sensitive information. We would be happy to brief you on the other types of tangible things the government has sought under this authority in an appropriate setting.

Your letters also ask about the application of certain statutory definitions contained in Title V. The government follows the terms "call detail records," "session-identifying information" and "specific selection term" as they are described in 50 U.S.C. § 1861(k)(3) and (4). The meaning of such terms are further informed by the legislative history of the USA FREEDOM Act. *See, e.g.*, H. Rep. No.114-109, pt. 1, at 17-20 (2015).

In addition, your letters ask for certain information regarding FISC Rule 11 notices and provider challenges under Title V of FISA. Since June 2, 2015, the government has not issued any Rule 11 notices in relation to any application involving authorities under Title V of FISA, nor has any provider challenged an order issued under Title V.

Finally, your letters ask for the number of criminal prosecutions that have resulted from or used in any way information obtained or derived under Title V of FISA, and whether any defendant(s) were provided notice of use of such information. Neither the FBI nor the Department tracks when criminal prosecutions have resulted from, or used in any way, information obtained or derived from tangible things obtained pursuant to Title V of FISA.

Nevertheless, the FBI has determined that, since June of 2015, approximately three counterterrorism investigations in which the FBI obtained an order under Title V of FISA resulted in the subject being prosecuted. The FBI does not know whether any evidence used in those prosecutions was obtained or derived from the Title V orders. It is also worth noting that Title V orders are more often sought in counterintelligence investigations, which often do not involve criminal activity. For example, an intelligence operative for a hostile foreign power may engage in clandestine intelligence activities that do not constitute criminal activity and would not result in the subject being prosecuted. Further, Title V of FISA does not require that the government notify a defendant when evidence obtained or derived from that authority is used in a prosecution; consequently, no such notice has been given to any defendants.

Thank you for your interest in this matter, and we look forward to working with you and the Congress on the reauthorization of the expiring provisions of FISA.

Sincerely,

Stephen E. Boyd
Assistant Attorney General